No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

APPELLANT'S REPLY BRIEF.

KEESLING & KEIL,
FRANCIS CARROLL,
315 Montgomery Street, San Francisco 4,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

No. 11,151

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE LOGIN CORPORATION (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

APPELLANT'S REPLY BRIEF.

Counsel for the Price Administrator contend that the evidence stipulated to in the trial Court presented no question of fact as to the issue to be determined there—whether Login had acted as selling agent or whether it had acted in its own behalf as an independent seller. The Administrator contends, as he is obliged to by the ruling of the trial Court, that Login, as a matter of law, could not be held the selling agent.

Although the Administrator prior to the sales in question had not seen fit to define, for the guidance of the trade, what he regarded as necessary to qualify one as a "selling agent", he supports his position by advancing reasons why Login can not now be held one.

These, on analysis, reduce themselves to the following three:

1. (At pages 3 to 8 and at page 10 of its brief.) Login sold the 334 cases after it had arranged with the principal to have all of the 1250 cases shipped. One can not sell goods as an agent if he sells them *after* he had arranged for the principal to ship them. This is not the law.

2. (At pages 8 and 9 of its brief.) Login arranged an advance to its principals of $17.00 per case of the $23.50 per case sales price. One can not be an agent if he has arranged an advance of part of the purchase price to his principal. This is not the law. (The amendment to the Import Regulation quoted was not in effect at the time of the transaction.)

3. (At pages 10 to 14 of its brief.) The third point while obscure seems to be that Login although forthrightedly a sales agent as to 916 cases of the shipment, as to the remaining 334 cases was "circumventing" and using a "cloak or device" to "disguise" its true character so as to enable it to "run with the hare" and "hold with the hounds", and thus evade the price regulation.

There is no evidence of evasion. If there were, it at most raised a question of fact as to whether Login was in good faith in acting as a seller's agent. This was a question for the jury.

Each of these points is now considered in detail:

APPELLEE'S FIRST POINT (pages 3 to 8 and page 10 of its brief.)

The appellee points out that Exhibit E (Tr. page 13), the confirmation of sale to the Cuban corporation, is dated October 7, 1943, whereas the stipulation recites that the orders for the 334 cases of lobsters were taken in December, 1943. From this appellee concludes that Login—as a matter of law—could not have made the San Francisco sales as an agent.

Appellee makes this argument despite the fact that he has stipulated that Login, who was admittedly primarily a sales agent, admittedly acting as such in regard to the balance of the carload of lobster, had this part in the sales in question:

> "It therefore notified a local food broker that although Login could not import and sell lobster because of its ceiling, if buyers had ceilings that permitted them to do so, and wished to import lobster,—Login could arrange the purchase from its principal in Cuba. The broker was notified that Login could act only as sales agent." (Tr., page 5.)

This is not merely Login's *claim* of what occurred. Appellee stipulated *it did* occur. Further he admits, not only that Login so advised the broker, but he stipulated, without qualification, that this *was* the manner in which the sales *actually were made:*

> "On this basis orders were taken in December, 1943, for 334 cases of lobster through the local broker." (Tr., page 5.)

The reasoning of counsel for appellee on this point is that the formal sales of the 334 cases were made

after the confirmation of sale on October 7, 1943, therefore the October 7, 1943 transaction must, as a matter of law, be a purchase by Login of the 334 cases. This result does not follow. It is not the law. Counsel's error is to assume that if a purchaser had not already bought the 334 cases the only alternative was that Login bought it in its own behalf. As counsel states at page 10 of its brief:

> "It seems tautological to comment on the legal possibility of being agent to a purchaser who did not exist."

We agree that being an agent *to* someone not in existence is a difficult concept. However, it is eminently possible—legally and factually—to be an agent (as Login was) for one's principal (the Cuban corporation) for the purpose of selling to purchasers (the San Francisco purchasers) who do exist, although not then defined.

Contrary to counsel's view there is nothing strange about being an agent for a seller even though the purchaser is not presently identified.

Rather, it is the normal situation. The primary activity of most sales agencies is to find purchasers not presently known.

Nor is there anything impossible—legally or factually—in an agent's ordering goods for delivery from its principal, and even receiving them, before resale to the ultimate consumer takes place. It is common knowledge and we think one of which the court will take judicial notice that this is true, for instance,

in most sales of farm produce by commission merchants and factors, by many dealers in automobile and farm machinery and in the case of all agents who receive merchandise on consignment for sales. In all such transactions title remains in the seller and the fact that the agent has received the goods in no way terminates his agency:

> "The averment of the complaint is that the automobile was received by the defendant under a contract whereby the defendant was to hold the property on consignment, and, when the automobile was sold, to forward to the Motor Company the sum of one thousand five hundred dollars. There is thus alleged not a contract of sale, but one which made the defendant the agent of the plaintiff's assignor to sell the automobile. The word 'consignment' does not imply a sale. The very term imports an agency, and that the title is in the consignor." (*Cass v. Rochester,* 174 Cal. Rep. 358, 363, 163 Pac. 212.)

Consequently, we say counsel for appellee is in error in stating that because the San Francisco purchasers were not identified on October 7, 1943, Login could not thereafter sell as an agent—and that this necessarily follows as a matter of law. It may well be that the confirmation of sale, Exhibit E, is technically in error in confirming a sale of the entire 1250 cases and that the formal sale of the 334 cases took place while the shipment was in transit. However, we submit that the resulting situation is entirely consistent with the agency relationship established by the facts stipulated to.

Appellee has stipulated that as to the other 916 cases Login was acting as sales agent for the Cuban Corporation; that Login normally is a sales agent and that from the outset its only action in regard to the 334 cases sold in San Francisco was to state that it, as agent, could arrange for the purchase of them by buyers whose ceiling permitted them to handle them. That in fact they were ordered on this basis, is admitted.

Counsel's statement in this connection at page 10 that "it is equally patent from the record that after the transaction of October 7, 1943, no negotiations were had between Login and the Cuban importers" is not true. As is indicated on pages 8 and 9 of the transcript when the purchasers finally paid Login in February or March, the remaining $6.50 per case due to the Cuban Corporation was fully accounted for by Login to its principal in Cuba, less proper charges and Login's commission of $1.17 per case. Likewise appellee's statement on page 6 indicating that Login as agent never placed an order for delivery of goods unless it had already sold them is we submit an unfair inference as will be demonstrated by a reading of the stipulation on that point.

There is no evidence in the record that Login purchased the 334 cases for its own account; that it ever at any time acted as the purchaser of them; that it ever asserted property rights on them or that they were handled in any manner different from the balance of the cases as to which was admittedly a sales

agent. Certainly it acted as and was, an agent in regard to its principal in Cuba and certainly acted as and was an agent in regard to the San Francisco purchasers.

The effect of the October 7, 1943, transaction, is not in conflict with these facts and all of them together, we submit, show, as a matter of law, that Login was a selling agent. If this Court should hold Exhibit E to raise some different inference, the most that can be said is that it should be submitted to the jury, under proper instructions as to its legal effect, with the other facts stipulated to, for determination of the question whether Login had acted as selling agent, or as an independent buyer. *It does not,* as a matter of law, prevent Login selling the goods as agent.

It may be well to again point out here that in this latter regard, the question before the Court is not whether there are any facts in the record which support a trial Court finding that there was no agency. Rather the question is whether there are any facts at all which would support a contrary finding. We submit that to read the record is to answer this question; it must be obvious that a finding that Login had acted as agent would be supported by the facts.

In either event, the trial Court's ruling, as a matter of law, was in error.

APPELLEE'S SECOND POINT. (pages 8 to 9 of its brief.)

Appellee's point here is that because Login arranged an advance to the Cuban Corporation of $17.00 of the sales price of $23.50 per case it, as a matter of law, could not act as a selling agent. Not only is this not the law but it is well settled that agents in fact do in many ways finance their principals or guarantee payment to the principals of the purchase price of the goods they sell for them.

The financing of a principal, in one way or another, is recognized by the law of the State of California as a proper function of an agent which in no way changes his status as agent or his obligations to his principal. This has long been the law in regard to such financing as direct advances of funds by a sales agent to his principal and in regard to a guarantee of payment of sale price, made by the agent to the principal:

Thus, in *Belmont v. Milton* (1941), 43 Cal. App. (2d) 120, 110 Pac. (2d) 525, the appellant was a consignee of the respondent for the marketing of oranges under a marketing agreement. He brought suit for advances made to his principal, the grower. In passing upon the propriety of allowing interest on the advances the Court at page 125 of Cal. App. (2d) said:

> "The court should have allowed interest on the advances made by appellant to respondent. We can only construe these advances as a loan, which, under the provisions of section 1914 of the Civil Code, bears interest. * * * The contract was not one of sale, but of consignment. Nor was appellant a del credere factor. Therefore there was

no money due respondent from appellant, until the first returns were received from the sale of oranges, and any advances made, were received from the sale of oranges, and any advances made, were in the nature of a loan, and in the absence of an agreement to the contrary, would bear legal interest. A factor, who is not a del credere factor, is entitled to interest on advances made. (25 Cor. Jur. p. 384, sec. 83; Imperial Valley etc. Assn. v. Davidson, 58 Cal. App. 551 (209 Pac. 58).)"

Again, in *Iwata v. Goldberg* (1927), 81 Cal. App. 304, 253 Pac. 331, the plaintiffs sued to recover damages under a contract whereby they had consigned cantaloupes to the defendant for sale. The plaintiffs contended the contract was one of sale. Advances were made to the plaintiff by the defendant under provisions of the contract providing that the plaintiff could draw at sight upon the defendant for the cost of each carload of cantaloupes shipped. In affirming the judgment for the defendant the Court said:

"The contract, as we look upon it, was not a sales contract, but was a contract for consignment of merchandise by principal to agent. (2) There was a promise on the part of the consignees to honor drafts drawn by the consignors, on account of each carload shipment, for an amount not less than the stated estimate of cost. In accounting for the sale of each such shipment, the consignees were to deduct and retain the amounts advanced 'on account of price guarantees'. But there is not in the contract any definite or intelligible certain guaranty of price, or warrant by con-

> signees that consignors should go without loss on any one of these shipments, or even on all of them together. Nevertheless, the consignors, plaintiffs herein, seek to recover on such supposed guaranty as a separate guaranty of the cost of each shipment, independent and apart from any other. So it is attempted here to compel the consignees to pay the amounts of said drafts covering estimated costs of the last eleven carloads, notwithstanding the fact that the defendants (although they did not make any advancements on these eleven carloads), have in fact accounted to plaintiffs for all sales of the merchandise shipped, and that the aggregate sum thus received leaves in the hands of the plaintiffs all of the net profits of the entire transaction."

Likewise, in *Cooper v. American, etc.* (1934), 137 Cal. App. 494, 30 Pac. (2d) 558, the plaintiff sued to recover damages for the alleged breach of contract by the defendant whom she had appointed her exclusive selling agent for fruit grown on her lands. The defendants made cash advances to the plaintiff. In ruling upon the appeal the Court stated:

> "That the parties hereto occupied the relationship of factor and principal cannot be disputed (sec. 2026, Civ. Code; Betts v. Southern California Fruit Exchange, 144 Cal. 402 (77 Pac. 993), and regardless of any advance to the plaintiff, it is the duty of the factor to obey the instructions of the principal. (Sec. 2027, Civ. Code.)"

And again in *Moulton v. Williams, etc.* (1932), 218 Cal. 106, 21 Pac. (2d) 936, suit was brought on

behalf of certain growers to recover on a bond for violation of a contract whereby grapes were consigned to the defendant for sale with a $15.00 per ton guarantee to the growers by the defendant consignee. The sales failed to realize the amount guaranteed and suit was brought. It was contended by the defendants that the transaction was in effect a sale. The Court said at page 109 of 218 Cal. Rep.:

> "We are unable to come to any other conclusion than that the failure of the corporation to account to the growers to the extent of $15 per ton for their grapes was a clear violation of the terms of the act. The contract was one of consignment and not a sale. The presence of the guaranty did not alter its essential feature. Title to the goods did not pass until sale was made by the factor. (Pugh v. Porter Bros., 118 Cal. 628 (50 Pac. 772.) The guaranty was but an inducement to the grower to enter into the contract."

Indeed, as the cases indicate, the *statutory* law of the State of California, in dealing with one of the oldest established forms of sales agency—that of principal and factor—recognizes financing of a principal by its selling agent as a proper function of the agent. Thus the Civil Code, which provides in Section 2026 that a factor is an agent who in the pursuit of an independent calling is employed by another to sell property for him, expressly provides in Section 2027 that he is still obliged to obey the instructions of his principal notwithstanding any advances he may have made to the principal, and provides in Section 2029 that a factor, who charges a commission for guaran-

teeing the payment of the sale price, does not thereby assume additional responsibility for the safety of his remittance of the proceeds although he is liable for the payment of the price when due. These sections have been law since the enactment of the codes since 1872.

It should be pointed out that *nothing* in the Maximum Import Price Regulation or those which preceded it or in the Statements of Considerations issued with them by the Office of Price Administration *excluded from the term "selling agent",* as used in the regulation, *an agent who financed his principal.* Although counsel does not expressly point it out, Amendment, Number Two, to the Maximum Import Price Regulation cited on page 9 of its brief was not in effect at the time of the transaction in question. What counsel attempts to do here is to make its amendment work retroactively and to apply its restricted definition to a transaction occuring prior to its date. Despite the fact that the administrator had issued no definition of selling agent whatsoever, it now attempts to exclude Login from its meaning for exercising functions long recognized by law and the trade as proper functions of an agent.

APPELLEE'S THIRD POINT. (pages 10 to 14 of its brief.)

It is difficult to determine the precise argument here made by the counsel for the price administrators. It apparently is that the Login's actions in selling the 334 case portion of the carload were a "subterfuge",

or "disguise" enabling it to avoid the price regulations.

We point out at the outset that there is no evidence of evasion in the record. The facts indicate the opposite. Login discontinued importing lobster to observe its ceiling; it offered as agent to secure it for those whose ceilings permitted it to import it. Six months earlier it has revealed an almost identical transaction to the Office of Price Administration Counsel. The Price Administrator has stipulated these facts are true, and can not, we submit, point to any facts justifying a charge of evasion. Further he stipulated that if any violation occurred it was not willful nor even the result of failure to take practicable precautions. (Tr. pages 17, 18.) Also it may be noted that the trial Court refused to issue an injunction enjoining any violations by the appellant. (Tr. page 19.)

The appellee cites numerous cases on pages 11 and 12 of its brief. These decisions have no bearing on the problem before the Court.

Taylor v. United States, 142 F. (2d) 808, decided by this Court, is an affirmance of the judgment entered against the defendant following a verdict of the jury in a criminal charge brought for violation of the emergency price control act.

Strauss v. Victor Talking Machine Co., 243 U. S. 490, 37 Supreme Court 412, is not in point. The Court there held, and properly, that a scheme of distribution disclosed by a so-called "License Notice" was a violation of law as an attempt to control the prices of articles sold.

U. S. v. Masonite Corp., 316 U. S. 265, 62 Supreme Court 1070, is we submit of no more assistance. The Supreme Court there held that the agreements involved were valid agency agreements:

> "We assume in this case that the agreements constituted the appellees as del credere agents of Masonite."

The holding of the case is that the agreements even though they are valid as agency agreements, nevertheless violate the Anti-trust Act because they are in restraint of trade.

Other cases cited enunciate the general rule that the terms used in a contract can not outweigh the effect of overt acts and conduct obviously contrary to the terminology used in the contract.

In the case before the Court we submit there is nothing in the exhibits of which counsel complains inconsistent with Login's actions as agent, or with its conduct regarding either its principal or its purchasers. The rule cited in these decisions therefore has no bearing on this case.

However, even if it be conceded that there is some inconsistency between the two written exhibits and the facts stipulated to the law required the Court to advise the jury of the legal effect of the documents and submit to it for determination from this and all of the facts the question whether Login was acting as an agent or was acting in its own behalf.

In this regard it is interesting to note that the three cases cited by appellee as applying the principle for which he contends and involving the Emergency Price

Control Act all reveal that the questions were not ruled upon as a matter of law by the trial Court but were submitted to the jury:

Taylor v. U. S. (supra), as has been pointed out involved an affirmance of a judgment rendered after a jury verdict.

In *U. S. v. Wise,* 150 Fed. (2d) 17, the Court affirmed a judgment rendered after a verdict of a jury finding the defendant guilty of violating the Act. Counsel has cited this case to the Court because of the manner in which the defendant's contention that he was a "finder", not a "seller", was dealt with. The manner in which it was dealt with is illuminating. The Court charged the jury that if he were a finder he could not be convicted, and as the Appellate Court states this contention that he was such "was not conclusive upon the jury, and it was their duty to interpret it for themselves."

Likewise in *U. S. v. Steiner,* 152 Fed. (2d) 484, from which appellee has quoted, reliance was had by the defendants upon an alleged ten year lease of farm machinery in which the entire rental for the ten year period was required to be paid at the time the lease was signed. The decision says in part:

> "As stated by the defendants in their briefs, 'the evidence on every material fact was wholly undisputed as to each of the transactions claimed to constitute the offense * * *' "

The trial Court submitted the entire matter to the jury instructing them as to the legal effect of the lease. The Appellate Court in approving this procedure states:

> "It was the duty of the court to construe the legal effect of the written instrument designated as a lease. * * *"
>
> * * * * * * *
>
> "This instruction was given by the court of its own motion in cause No. 8818, and it properly left to the jury the question of the good faith and wilfulness of the defendant in each appeal."

It is appellant's position here that there is no evidence of evasion in the instant case, and that on all the facts Login was a selling agent as a matter of law. However, if as is contended by the appellee the documents of which it complains do raise some inference of evasion, we repeat that the proper procedure for the trial Court was to submit to the jury the entire question as was done in the cited case, with proper instructions as to the legal effect of the documents.

In either event the ruling of the trial Court deciding that Login, as a matter of law, was not a selling agent, is error.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
April 3, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Appellant.